Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1972

No. 72-1109

CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF RUSH, HENRIETTA, PITTSFORD and BRIGHTON, COUNTY OF MONROE, STATE OF NEW YORK; RICHARD E. TEN HAKEN, individually and as Superintendent of Schools; CARL ZIEGLER, RICHARD BOBBE, JAMES BREESE, CAROLYN McWILLIAMS, JOHN YOUNG and RANDALL CARTWRIGHT, all individually and as THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF RUSH, HENRIETTA, PITTSFORD and BRIGHTON, COUNTY OF MONROE, STATE OF NEW YORK,

Petitioners,

v.

MRS. SUSAN RUSSO,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

WILLIAM H. MORRIS,
WILLIAM D. EGGERS,
NIXON, HARGRAVE, DEVANS & DOYLE,
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Counsel for Petitioners.

January 31, 1973.

THE REPORTER COMPANY, INC., Walton, N. Y. 13856—607 865-4131—1973

Table of Contents.

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes and Regulations	3
United States Statutes	3
New York Statutes	4
Regulations of New York Commissioner of Education	4
Board of Education Rule	5
Statement of the Case	6
Reasons for Granting the Writ	7
POINT I. The decision below decides an important question of federal law which should be decided by this Court	7
POINT II. The decision below fails to accord to the findings of the District Court the weight required by F.R.C.P. 52	12
Conclusion	15

Page

APPENDIX:

Order and Judgment of District Court 16

Opinion of Court of Appeals 23

CITATIONS.

CASES:

Board of Education v. Barnette, 319 U. S. 624 (1943) 8

James v. Board of Education, 461 F. 2d 566 (2d Cir. 1972), cert. den. U. S. (12/6/72) 9, 10

Pickering v. Board of Education, 391 U. S. 563 (1968) 9, 10

Tinker v. DesMoines Independent Community School District, 393 U. S. 503 (1969) 8

Zenith Radio Corp. v. Hazeltine Research, 395 U. S. 100 (1969) 14

STATUTES AND REGULATIONS:

36 U.S.C.A. §172 3

28 U.S.C.A. §1343 3

42 U.S.C.A. §1983 4

New York Education Law §802 4

Regulations of New York Commissioner of Education (8 CRRNY §§ 108.5, 108.7) 4

Board of Education Rule 5

In The

Supreme Court of the United States

October Term 1972

No. .

Central School District No. 1, Towns of Rush, Henrietta, Pittsford and Brighton, County of Monroe, State of New York; Richard E. Ten Haken, Individually and as Superintendent of Schools; Carl Ziegler, Richard Bobbe, James Breese, Carolyn McWilliams, John Young and Randall Cartwright, all Individually and as the Board of Education of Central School District No. 1, Towns of Rush, Henrietta, Pittsford, and Brighton, County of Monroe, State of New York,

Petitioners,

v.

Mrs. Susan Russo,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, a central school district, the superintendent of schools, and the members of the board of education of the District, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on November 14, 1972.

Opinion Below.

The opinion of the Court of Appeals, reported at 469 F. 2d 623 , is reproduced in the Appendix hereto. The order and judgment of the United States District Court for the Western District of New York is also reproduced in the Appendix.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on November 14, 1972. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. In carrying out a program providing for a salute to the flag and the daily pledge of allegiance to the flag, as authorized and required by New York State law, may a local school board lawfully require its teachers to participate in and lead their students in a daily pledge of allegiance, and terminate the probationary employment of a teacher who refuses to participate in or lead the pledge, over the claim that the teacher's rights of expression and belief are thereby infringed?

2. Did the Court of Appeals err in substituting its findings for the findings of the District Court that respondent was dismissed for sufficient reasons other than her refusal to participate in the pledge of allegiance, when the District Court's findings had substantial support in the record and the Court of Appeals "scrutinize[d] the findings with a sharper eye than is ordinarily appropriate"?

Statutes and Regulations.

United States Statutes.

36 U.S.C.A. §172.

Pledge of allegiance to the flag; manner of delivery.

The following is designated as the pledge of allegiance to the flag: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." Such pledge should be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute.

28 U.S.C.A. §1343. Civil Rights and Elective Franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C.A. §1983. Civil Action for Deprivation o
Rights

Every person who, under color of any statute, ordi
nance, regulation, custom, or usage, of any State or Ter
ritory, subjects, or causes to be subjected, any citize
of the United States or other person within the jurisdic
tion thereof of the deprivation of any rights, privileges
or immunities secured by the Constitution and laws, shal
be liable to the party injured in an action at law, sui
in equity, or other proper proceeding for redress.

New York Statutes.

Education Law §802. Instruction Relating to th
Flag; Holidays

1. It shall be the duty of the commissioner of educatio
to prepare, for the use of the public schools of the state
a program providing for a salute to the flag and a dail
pledge of allegiance to the flag, for instruction in its cor
rect use and display and such other patriotic exercise
as may be deemed by him to be expedient, under such
regulations and instructions as may best meet the varie
requirements of the different grades in such schools.

• • •

Regulations of New York Commissioner of Education.

108.5 Pledge to the Flag. (a) It is recommende
that schools use the following pledge to the flag:

> "I pledge allegiance to the flag of the Unite
> States of America and to the Republic for whic
> it stands, one Nation, under God, indivisible, wit
> liberty and justice for all."

(b) In giving the pledge to the flag, the procedure is to render the pledge by standing with the right hand over the heart.

• • •

108.7 OTHER INSTRUCTION. Instruction concerning the flag as a symbol of American life should not be limited to the observance of Flag Day. Before leaving the elementary school each child should come to think of himself as a "maker of the flag" and each pupil who passes through the secondary school should be guided in sober thought as to the meaning of "liberty and justice for all."

(8 CRRNY §§108.5, 108.7.)

Board of Education Rule.

September 5, 1969

To: Staff

From: Donald A. Loughlin

RE: Salute to the Flag

The Pledge to the Flag will not be recorded on tape this year. All students and staff members are expected to salute the flag.

Those students and staff members in the hall should go into the nearest room during the salute and participate.

DAL/as

Statement of the Case.

This action was brought by a public high-school teacher who was employed by the School District and who claims that her probationary appointment was terminated in violation of her constitutional rights to free speech and due process. She sought damages, an order of reinstatement, and injunctive relief against the District, the District superintendent, and the members of the Board of Education. She asserts a violation of the Civil Rights Act (42 U.S.C. 1983) and claims federal jurisdiction under 28 U.S.C. §1343(3) and (4).

Pursuant to New York Education Law §802, the Commissioner of Education is required to prepare for the use of the public schools a program providing for a salute to the flag and a daily pledge of allegiance, and to promulgate appropriate regulations. The regulations as promulgated adopt the provisions of the federal statutes (36 U.S.C. §172) and provide further for instructions concerning the flag. In September 1969, petitioner School District adopted a regulation requiring all students and staff members to participate in the pledge of allegiance and to salute the flag.

Respondent was employed by the School District as an art teacher for the school year 1969-1970, with a probationary period pursuant to New York Education Law §3012(1), beginning September 1, 1969. During April 1970, it came to the attention of the principal of the school that she was not reciting the pledge of allegiance with her homeroom class as required by the school regulation. Respondent admitted that she was not participating in the pledge of allegiance, and asserted that she would continue to refrain from participation as a matter of conscience.

By a resolution adopted at a meeting on June 23, 1970, the School Board terminated respondent's probationary appointment, and notice was duly sent to respondent, all in accordance with the procedural requirements of New York law.

Respondent brought this action against the School District and against both the Superintendent of Schools and the members of the Board of Education, both in their individual and representative capacities. Following a trial in the United States District Court for the Western District of New York, a judgment and order dismissing the complaint were entered upon the findings of Judge Burke. The Court of Appeals has reversed those findings, substituted new findings, and held that the respondent was dismissed solely for her refusal to comply with the school regulation which required her to lead her class in the pledge of allegiance, in violation of her First Amendment rights. The Court of Appeals remanded to the District Court for further proceedings.

Reasons for Granting the Writ.

POINT I

The decision below decides an important question of federal law which should be decided by this Court.

In its decision, the Court of Appeals recognized that

> [s]chools . . . have a substantial interest in maintaining flag salute programs [and] [s]chool officials . . . may enforce regulations whose purpose is to give effect to this legitimate state aim. (App., p. 38-39)

The Court accepted the lower court's findings that school policy required teachers to lead their classes in the pledge exercise and that Mrs. Russo was aware of her responsibility in this respect. (App., p. 34) However, the Court held that respondent should not have been dismissed at the end of the school year for her failure to participate in a daily classroom pledge of allegiance and flag salute, because "the state's interests in maintaining a flag salute program was well served in [respondent's] classroom [during the 1969-1970 school year], even without her participation in the pledge ceremonies." (App., p. 39-40) The Court of Appeals reached that conclusion (1) by applying the novel principle that a school board regulation, otherwise valid, infringes upon First Amendment activities unless it achieves its goal by the least restrictive means, and (2) by focusing exclusively upon respondent's particular circumstances during the 1969-1970 school year.

The order of the Court of Appeals determines an important and significant question of Federal Constitutional law. The elements of patriotic duty and loyalty embodied in the flag salute and the pledge of allegiance, of the authority of the State and its local educational units with respect to the inculcation of patriotic values, and of the limits imposed upon the exercise of that authority by First Amendment rights combine to raise an unanswered question of nationwide import. Related, but distinguishable, questions involving the rights of students have warranted this Court's plenary consideration. (*Board of Education v. Barnette*, 319 U. S. 624 [1943]; *Tinker v. DesMoines Independent Community School District*, 393 U. S. 503 [1969].) The questions raised in this petition are distinguishable from the student First Amendment cases because a teacher voluntarily undertakes certain responsibilities when he accepts employment and because it is recognized that a school district may lawfully exercise substantial discretion in con-

trolling the educational process in its schools. Although this point of distinction was noted by the lower court, and it is plain that that court considered the issue presented as one of first impression, petitioners submit that that court's decision entails an artificial restraint upon the enforcement of reasonable regulations designed to carry out legitimate educational purposes and is unwarranted by First Amendment precedent.

As the issues and questions raised here are different from the leading student First Amendment cases, so also are they different from *Pickering v. Board of Education,* 391 U. S. 563 (1968), and other teacher cases involving expressions of opinion about issues of general public interest. In *Pickering,* the Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak [outside of classroom hours] on issues of public importance may not furnish the basis for his dismissal from public employment" (391 U. S. at 574-575). That case is easily distinguishable on the ground that it involved activities outside the school day, while here a legitimate class activity is directly concerned. Nor was the issue raised in this case presented by *James v. Board of Education,* 461 F. 2d 566 (2d Cir. 1972), cert. den. U. S. (12/6/72), where the Court of Appeals held that a school district may not discharge a teacher who did no more than wear a black arm band in class in symbolic protest against the Vietnam War, in the absence of any disruption of classroom activities. The symbolic expression of political views in *James* was found not to interfere with school discipline or any legitimate educational program, and therefore the school district had no justification for interfering with the teacher's right to free expression. That case is materially different from the instant case because here the symbolic expression of political views

constituted a direct refusal to perform a legitimate educational task. Unlike *Pickering* and *James,* where the authority of a school board to carry out its legitimate educational tasks was not involved, or only tangentially involved, this petition raises questions of constitutional dimension where the authority of the Board to carry out its proper tasks is directly at stake.

Petitioners submit that the Court of Appeals erred in limiting its consideration to the particular facts of respondent's classroom in the 1969-1970 school year and thereby imposing upon petitioners the responsibility to modify its otherwise valid regulations on a case-by-case basis. Once it is granted, as petitioners contend it must be, that a flag salute program is a legitimate part of an educational program, then it follows that a school board may require its teachers to conduct that program in such a manner as shall seem best to the school board. Whether that program is to be conducted at a general assembly or at individual homerooms is for the appropriate school officials, not appellate Federal courts, to decide. If one teacher is assigned to each homeroom, each teacher may validly be required to participate, and it should make no difference of constitutional dimension that the school board could make adjustments or reassignments when a particular teacher conscientiously objects to the performance of her lawful duties.

Petitioners submit that the Court of Appeals erred in imposing the burden upon school officials to find the least restrictive manner of accomplishing a legitimate state educational goal. Merely because a senior instructor was present in respondent's classroom, and that senior instructor was capable of conducting the pledge in spite of respondent's conscientious refusal to participate, does not mean that petitioner School Board may not terminate

respondent's employment when she refuses to carry out a valid educational goal. The restrictive standard imposed by the Court of Appeals has no more validity with respect to the flag salute program than it would have with respect to instructions in American History or any other legitimate educational program. Where a teacher refuses to perform her duties, whether on grounds of conscience or on some other grounds, a school board ought not be required to determine whether by reassignment, or the use of double classrooms, or the assignment of two teachers to a single room, its purposes may otherwise be fulfilled. In short, the standard imposed by the Court of Appeals infringes upon the discretionary authority of the School Board in an unprecedented degree.

Furthermore, the School Board should not have been required to have waited until the 1970-1971 school year to decide if the circumstances at that time would have permitted two teachers to be assigned to respondent's homeroom. The Board's power to terminate a teacher's employment depends ultimately on whether it has asked her to perform a legitimate school function and whether her refusal is consistent with her duties. It does not depend upon whether her refusal could be overcome, at a given classroom in a given year, by other personnel.

The questions raised are important and of nationwide significance. Challenged in this case is the flag salute and pledge of allegiance program adopted in New York State pursuant to law and statewide regulation. Other states have similar programs. As a result of the decision appealed from, every school board in every state must determine in what circumstances it may ask its teachers to participate in a pledge of allegiance. A question of this dimension, involving the traditional

ceremony by which children are instructed in the underlying values of this country, should be entertained and determined by this Court.

Although, procedurally, the judgment of the Court of Appeals is nonfinal, the judgment is nevertheless a final determination by that court of important and significant questions of First Amendment Federal law which have not been, but should be, settled by this Court. The determination of the Court of Appeals was based upon a full trial record.* If the judgment of the Court of Appeals is incorrect as a matter of constitutional law, then the complaint should be dismissed and the case put to rest. Because of the significance of this case, petitioners urge that the resolution of the important questions here presented not be deferred.

POINT II

The decision below fails to accord to the findings of the District Court the weight required by F.R.C.P. 52.

For the reasons stated in Point I, *supra,* petitioners submit that the ruling of the Court of Appeals constitutes an unprecedented invasion into the discretionary authority of the School Board to perform its lawful functions, even if it be assumed that respondent was discharged solely for her failure to participate in and lead

*The District Court found as a fact that there were several nonconstitutional reasons for her dismissal, and concluded that there was no deprivation of First or Fourteenth Amendment rights in her dismissal. The Court of Appeals held that the District Court's findings of fact were "clearly erroneous" (App., p. 32), except with regard to the finding concerning her refusal to recite the pledge, and concluded that that was the sole reason for her termination. See Point II.

the pledge of allegiance. The record shows, however, that there was substantial evidence presented not only by the District's administrative personnel but also by members of the Board to establish additional sufficient reasons for respondent's discharge. That testimony, largely uncontradicted, showed that respondent was discharged because she refused to follow school regulations (pp. 161a-162a, 188a-189a, 235a),* refused to teach a ceramics course (pp. 149a-150a, 161a, 197a, 236a, 254a, 301a, 308a-309a), failed to cooperate with administrative personnel at her school (pp. 235a-236a, 253a, 269a-270a, 287a-288a), failed to perform hall duty (pp. 160a-161a, 195a, 208a), and involved members of the student body in her conflict with the school (pp. 142a-145a, 223a, 229a-231a, 236a-237a, 268a, 306a). Questions of the credibility and the import of such testimony were, of course, resolved in favor of petitioners by the District Court in its finding that

> [Respondent's] probationary appointment was terminated for her failure to follow school regulations, her refusal to teach a course in the art department, her lack of cooperation, her refusal to participate in the pledge of allegiance, her failure to perform all duties, and her involvement of the student body in her conflict with the school. (App., p. 20)

Petitioners submit that the Court of Appeals failed to accord that finding, and the testimony on which it was based, the respect required by Rule 52(a) of the Federal Rules of Civil Procedure.

The Court of Appeals felt compelled "to scrutinize the findings with a sharper eye than is ordinarily appropriate" because it viewed the District Court's findings as "cryp-

*This series of page citations is to the Appendix below.

tic" and "couched in extraordinarily broad and general terms . . ." (App., pp. 30-32) Those findings, however, cover more than five pages in the record, are addressed to the particular factual allegations of the parties, and are fully adequate to apprise the parties and the appellate courts of the District Court's determinations. Had the Court of Appeals entertained doubt about the resolution of factual questions by the District Court, it could have remanded for more specific findings. Since there was no genuine doubt about the manner in which the District Court had resolved the factual disputes, petitioners submit that the Court of Appeals had no justification for according less weight to the District Court's finding than is required by law.

The decision of the Court of Appeals that the trial court's findings of fact were clearly erroneous is, of course, subject to review by this Court. In *Zenith Radio Corp. v. Hazeltine Research*, 395 U. S. 100 (1969), the Court granted certiorari "to consider among other things whether the Court of Appeals properly discharged its appellate function under Rule 52(a) of the Federal Rules of Civil Procedure . . ." (at p. 108) and in reversing set out the applicable principles:

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence . . . (p. 123)

Involved in this appeal is the question of the specificity with which a district court must make its findings in order for those findings to be accorded due weight on review. Phrased differently, the question raised is whether an appellate court may carve out an exception to the usual standard of review for cases in which the appellate court believes that the district court's findings were less sufficiently detailed than the appellate court feels to be warranted. The apparent departure by this Court of Appeals from the standard of review mandated by Rule 52(a) furnishes a second, substantial reason for granting the writ of certiorari to review its order.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: January 31, 1973

Respectfully submitted,

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Of Counsel for Petitioners

APPENDIX

Order & Judgment of District Court.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

MRS. SUSAN RUSSO,

Plaintiff,

vs.

CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF RUSH, HENRIETTA, PITTSFORD and BRIGHTON, COUNTY OF MONROE, STATE OF NEW YORK, RICHARD E. TEN HAKEN, Individually and as Superintendent of Schools; CARL ZIEGLER, RICHARD BOBBE, JAMES BREESE, ROBERT GOLDSTEIN, CAROLYN McWILLIAMS, JOHN YOUNG and RANDALL CARTWRIGHT, all Individually and as the Board of Education of Central School District No. 1, Towns of Rush, Henrietta, Pittsford, and Brighton, County of Monroe, State of New York,

Defendants.

Civil 1970-425

Sneeringer & Rowley, 90 State Street, Albany, N. Y. 12207, Attorneys for plaintiff.

Nixon, Hargrave, Devans & Doyle, 1 Exchange Street, Rochester, N. Y. 14614 (William H. Morris, of counsel), and Robert H. Wendt, 65 Broad Street, Rochester, N. Y. 14614, Attorneys for defendants.

Trial before the undersigned at Rochester, New York, July 7, 1971.

Findings of Fact

1. Plaintiff was employed by the defendant, Central School District No. 1, for the school year 1969-70 as an art teacher at Sperry High School, with a probationary period beginning September 1, 1969. She had been certified by the State Education Department as an art teacher for five years effective September 1, 1969. (Ex. P-1). She signed an oath of allegiance on August 27, 1969.

2. She attended orientation sessions for new teachers at the beginning of the school year. The orientation program advised new teachers, including the plaintiff, to daily check their mail boxes and the bulletin board in the main office of the school. As part of the orientation program new teachers, including the plaintiff, were instructed as part of the faculty advisory system, one of their duties was to assist and guide students in understanding and complying with the rules and regulations of the school. The same instructions were contained in the Teachers Handbook, a copy of which was furnished to the plaintiff.

3. On or about September 5, 1969, there was placed on the bulletin board in the main office of the school a written notice as follows:

"To:

Staff

From:

Donald A. Loughlin

September 5, 1969

RE: Salute to the Flag

The Pledge to the Flag will not be recorded on tape this year. All students and staff members are expected to salute the flag.

Those students and staff members in the hall should go into the nearest room during the salute and participate.

DAL/as"

4. I reject the plaintiff's testimony that she did not see this notice on the bulletin board. She had very positive feelings about the pledge of allegiance to the flag. She objected to the pledge because she did not think that anyone could demand the recitation of an oath of allegiance, and she objected to the pledge because the words "liberty and justice for all" are inaccurate, and that it was hypocritical to say that as a truth. She did not categorically deny seeing the notice posted on the bulletin board. She said she did not remember seeing it. She knew from the beginning of the school year that her failure to participate in the pledge of allegiance was not in accordance with the conduct of other teachers in the school. I am not persuaded that she continued to fail to conform with the conduct of other teachers in the school in regard to participating in the pledge of allegiance in ignorance of what was required officially of teachers in this respect. I find on the evidence that she knew from the beginning of the school year that teachers were required to salute the flag, and that with such knowledge she refrained persistently from reciting the pledge.

5. The schools in District No. 1, were, on February 2, 1970, instructed by the Superintendent to continue to observe the provisions of law and regulations of the Commissioner of Education relating to the pledge of allegiance and the salute to the flag. The resolutions adopted by the Board on April 14, 1970 and May 12, 1970, relating to the salute to the flag and pledge of allegiance, and the regulations pursuant thereto, were not made applicable to the faculty because of the advice of counsel that faculty participation was covered by state law.

6. On or about April 19, 1970, Loughlin, Principal of Sperry High School, was advised that plaintiff was not reciting the pledge of allegiance. He observed her on two occasions during the salute to the flag and observed that she was not reciting the pledge. On or about April 19, 1970, he discussed with the plaintiff her failure to recite the pledge of allegiance and expressed to her his disapproval of her conduct. She claimed the right to abstain from reciting the pledge as a matter of conscience. Never before this had she made known to school authorities her objections to participating in the pledge of allegiance. Plaintiff continued after April 19, 1970, to refrain from reciting the pledge of allegiance.

7. On April 15, 1970, plaintiff discussed a ceramics teaching assignment with Loughlin and other members of the art department. During that discussion the qualifications of a successor appointee for teaching ceramics came up. The plaintiff at that time expressed her opinion that the teacher who had been hired for the following year was not qualified to teach ceramics. She at that time stated to Loughlin that she would not teach ceramics. Loughlin had not asked her to teach ceramics the following year. She volunteered that she would not teach a course in ceramics, this in spite of the fact that she had been certified by the State Education Department as an art teacher.

8. On or about May 1, 1970 Loughlin informed plaintiff that he intended to recommend to the superintendent that her probationary appointment not be renewed for the 1970-71 school year. He did so recommend on May 2, 1970.

9. The evaluation of the plaintiff's performance as a teacher made in 1970 was that she had not met her responsibilities. By resolution of the Board on June 23, 1970, plaintiff's probationary appointment was terminated

upon the recommendation of the Superintendent to the Board. Notice thereof was sent to the plaintiff.

10. Her probationary appointment was terminated for her failure to follow school regulations, her refusal to teach a course in the art department, her lack of cooperation, her refusal to participate in the pledge of allegiance, her failure to perform all duties, and her involvement of the student body in her conflict with the school.

Conclusions of Law

1. The laws of the United States and of the State of New York and the regulations of the Commissioner of Education of New York require a program providing for a salute and a pledge of allegiance to the flag. Plaintiff's persistent refraining from leading her class in the pledge of allegiance constituted a violation of her duties as a teacher and a violation of the school regulations, and evidenced a lack of cooperation on her part with school authorities in the performance of her duties as a teacher.

2. The resolution of the Board on June 23, 1970 terminated plaintiff's probationary appointment upon the recommendation of the Superintendent. The sending of the notice thereof to the plaintiff was in accordance with the procedural provisions of the Education Law. Under the Education Law the Board was not required to state to the plaintiff any reason for the termination of her probationary appointment. The terminating of her probationary appointment was for good and sufficient cause. It did not violate plaintiff's constitutional rights.

3. The termination of her probationary contract did not deprive her of the right to freedom of speech, as protected by the First and Fourteenth Amendments to the United States Constitution.

4. The termination of her probationary appointment without giving her notice of the charges against her did not deprive her of due process of law. Such termination was not in violation of her constitutional rights.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the complaint is dismissed on the merits with costs against the plaintiff to be taxed by the Clerk.

January 31, 1972.

HAROLD P. BURKE
United States District Judge

APPENDIX.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 26—September Term, 1972.

(Argued October 19, 1972 Decided November 14, 1972.)

Docket No. 72-1303

MRS. SUSAN RUSSO,

Appellant,

v.

CENTRAL SCHOOL DISTRICT No. 1, TOWNS OF RUSH, HENRIETTA, PITTSFORD and BRIGHTON, COUNTY OF MONROE, STATE OF NEW YORK; RICHARD E. TEN HAKEN, Individually and as Superintendent of Schools; CARL ZIEGLER, RICHARD BOOBE, JAMES BREESE, ROBERT GOLDSTEIN, CAROLYN MCWILLIAMS, JOHN YOUNG and RANDALL CARTWRIGHT, all individually and as the Board of Education of CENTRAL SCHOOL DISTRICT No. 1, TOWNS OF RUSH, HENRIETTA, PITTSFORD and BRIGHTON, COUNTY OF MONROE, STATE OF NEW YORK,

Appellees.

Before:

WATERMAN, SMITH and KAUFMAN,

Circuit Judges.

Appeal from a judgment and order of the United States District Court for the Western District of New York, Harold P. Burke, *Judge,* dismissing a high school teacher's complaint brought under 28 U.S.C. sec. 1343(3) and 42 U.S.C. sec. 1983, alleging that school officials violated her

constitutional rights by discharging her for standing silently at attention during daily classroom recitation of the pledge of allegiance in which school regulations required her to participate.

Reversed and remanded.

Richard R. Rowley, Albany, N.Y. (Sneeringer and Rowley, Albany, N.Y. Jeffrey G. Plant, of counsel), *for Appellant.*

William H. Morris, Rochester, N.Y. (Nixon, Hargrave, Devans & Doyle, Rochester, N.Y.; Robert H. Wendt, Rochester, N.Y., of counsel), *for Appellees.*

Kaufman, *Circuit Judge:*

Events that occur in small towns sometimes have a way of raising large constitutional questions. Henrietta, New York, a town of approximately 6,500 residents, is the geographic setting of this important case, in which we are asked to decide whether the dismissal of Mrs. Susan Russo, a high school art teacher, for what in the end amounts to a silent refusal to participate in her school's daily flag salute ceremonies, violated her constitutional rights under the First Amendment. As in *James* v. *Board of Education,* 461 F.2d 566 (2d Cir. 1972), decided by the Court just a few months ago, we must ascertain, and ultimately assess, the sometimes conflicting interests of the state on the one hand, in maintaining and promoting the discipline necessary to the proper functioning of schools, and the interest of a teacher, on the other, freely to exercise fundamental rights of expression and belief guaranteed by the Bill of Rights. There is, however, more to this case than even that difficult balancing test requires, for we are mindful of the

fact that the problems associated with the short-hand phrase, "flag salute," bare a complex of deep emotions, calling into question the meaning of patriotism and loyalty, and the different significance those words have for different people. This case, therefore, is made more difficult for us, "not because the principles of decision are obscure, but because the flag involved is our own." *Board of Education* v. *Barnette*, 319 U.S. 624, 641 (1943).

I.

The facts, which we glean from the trial record below, are as follows. Susan Russo was appointed by the Board of Education for the Rush-Henrietta School District, as a probationary art teacher, and assigned, as of September 1, 1969, to the James E. Sperry High School in Henrietta. As a condition of her employment, Mrs. Russo was required by New York Education Law § 3002 to sign a loyalty oath affirming her support of the Constitution of the United States and of New York State. She signed that oath, without reservation, on August 27, 1969.

In September, 1969, shortly after the school year began, a notice appeared on the school's bulletin board announcing that the "pledge of allegiance" would be recited each day and that "all students and staff members [were] expected to salute the flag." The practice at the Sperry School was to have the pledge read into the school's intercommunciation system by a faculty member or a student. Students and teachers would then stand in their homeroom classes, and recite the pledge along with the voice over the public address system.

Mrs. Russo, in addition to her duties as an art instructor, was assigned to homeroom duty and charged with supervision of between twenty and twenty-five children, ranging from fourteen to sixteen years of age. Mrs. Catherine Adams, a teacher with seven years experience

in the Rush-Henrietta school district, was also assigned to supervise the same homeroom, and to exercise senior authority in the classroom.

Although Mrs. Adams saluted the flag and recited the pledge each morning with her class, Mrs. Russo did not. From her first day in school, when it came time to recite the pledge, Mrs. Russo rose and faced the flag, but neither recited the pledge nor saluted the flag. She simply stood at respectful attention, with her hands at her sides. Significantly, there is no evidence in the record indicating that Mrs. Russo ever tried to influence her students to follow her example, and no evidence disclosing even a trace of disruption in the classroom as a result of her action. The students all knew the pledge and, under Mrs. Adams's guidance recited it each day, without incident. Mrs. Russo's belief, the sincerity of which is unchallenged in these proceedings, was that the phrase "liberty and justice for all" appearing in the pledge, which to most of us represents the spirit and abiding genius of our institutions, in her mind simply did not reflect the quality of life in America today. For this reason, she felt it to be an act of hypocrisy on her part to mouth the words of the pledge when she lacked a belief in either their accuracy or efficacy.

Although Mrs. Russo had not recited the pledge from the start of the school year in September, her action did not come to the attention of school officials until some time in April, 1970. In fact, as late as April 17, 1970, a teacher's report based on actual observation was prepared by James Bennett, an assistant principal at the Sperry school. He evaluated Mrs. Russo's classroom performance as favorable in all respects.[1]

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1 The portion of Bennett's report, listed as "Summary and Recommendations" appears below:

I have taken the opportunity to "pass through" several of Mrs. Russo's classes throughout the year and observe her students at

About that time, in April 1970, certain students and parents reported to the principal, Donald Loughlin, that Mrs. Russo was not saluting the flag. On the morning of April 19, Loughlin entered Mrs. Russo's homeroom class and observed her standing in silence as the pledge was being recited. The following day Mrs. Russo was summoned to Loughlin's office and asked to explain her behavior. Mrs. Russo did so, as we have indicated, adding that her unwillingness to recite the pledge and salute the flag was a matter of personal conscience.

It was hardly coincidence that school officials were informed of Mrs. Russo's behavior in the spring of 1970. During the preceding months the school's flag salute regulations had become a matter of some controversy in Henrietta, and its surrounding towns. A directive of the school Board, issued on February 2, reminded school principals that all students were to stand during the pledge. On April 14, the Board reversed itself and announced that students who were unable to participate in the pledge

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work and I have observed her Studio in Art class for an entire period. The current project in that class is a work, preferably in 3-D or a stylistic interpretation, involving social commentary.

Comments—

Mrs. Russo has a congenial, relaxed personality and meets students at their level. The pupil-teacher relationship has always appeared quite good.

Teaching methods and techniques appear to be resourceful and appropriate to individualized instruction in a creative atmosphere. The teacher adopts the role of resource person and helper—guiding individual initiative.

The teacher plans basic time periods for each project but is flexible in regard to completion time so as to allow for individual differences. Those that finish a project early are encouraged to practice drawing and painting skills.

Student participation has generally appeared to be at a high level—most seem busy at work generally.

"....."

By this account, Mrs. Russo appears to have been an exemplary teacher.

ceremonies because of sincere conscientious belief, would be permitted to remain seated during the pledge if they chose to do so. This Board regulation was the subject of bitter dispute at an open meeting of the school Board. A few days later, on May 1, Principal Loughlin visited Mrs. Russo's class for a second time and observed her activity during the pledge. At a subsequent meeting in his office, Loughlin told Mrs. Russo that he intended to recommend that her probationary appointment not be renewed unless she resigned. Mrs. Russo asked Loughlin for the reasons underlying his decision, but he refused to supply any, stating that he was not compelled to explain his action with respect to a probationary teacher.[2] Mrs. Russo refused to resign.

On May 12, Loughlin wrote Superintendent of Schools Richard E. TenHaken, recommending that Mrs. Russo not be reappointed for the coming academic year, and that her employment status be terminated, effective June 30. On the evening of May 12, however, the school board announced new regulations governing student conduct during the pledge. The new regulations modified the policy adopted on April 14 by requiring all students who refused to salute the flag to stand in respectful silence. Finally, at a meeting

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2 New York Education Law sec. 3012, Tenure, provides:

> 1. Teachers, principals, supervisors and all other members of the teaching and supervising staff shall be appointed by the board of education . . . upon the recommendation of [the] superintendent of schools, for a probationary period of three years. The service of a person appointed to any of such positions may be discontinued at any time during such probationary period, on the recommendation of the superintendent of schools, by a majority of the board of education.
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> 2. At the expiration of the probationary terms of a person appointed for such term, subject to the conditions of this section the superintendent of schools shall make a written report to the board of education recommending for appointment on tenure those persons who have been found competent, efficient and satisfactory. . . .

of the school board, held on June 23, Mrs. Russo was dismissed from service at the Sperry school. No reasons for her dismissal were set forth by the Board. A notice of termination sent to Mrs. Russo by the District Clerk similarly did not provide any statement of the grounds for her dismissal.

II.

This action was brought by Mrs. Russo pursuant to provisions of the Civil Rights Act, 42 U.S.C. § 1983,[3] and 28 U.S.C. § 1343,[4] alleging that her dismissal for refusing to pledge allegiance to the flag violated her First Amendment rights, and that the Board's failure to state reasons for her dismissal denied her the procedural protections safeguarded by the Due Process Clause of the Fourteenth Amendment. Mrs. Russo seeks reinstatement with back pay, and damages. In view of our decision on the merits

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3 42 U.S.C. sec. 1983, Civil Action for Deprivation of Rights provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

4 28 U.S.C. sec. 1343. Civil Rights and Elective Franchise, provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress, providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

of the First Amendment challenge,[5] we do not reach Mrs. Russo's Due Process claim.[6]

As a preliminary matter we are constrained to comment on the cryptic findings filed by the court below. After trial, Judge Burke dismissed Mrs. Russo's complaint on the merits, holding, in a brief series of findings and conclusions unaccompanied by any opinion, that neither First nor Fourteenth Amendment rights were violated in the dismissal of June 30, 1970. Judge Burke recited without explanation that Mrs. Russo's probationary appointment was terminated because of: (1) "her failure to follow school regulations," (2) "her refusal to teach a course in

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5 We reach the merits here because Mrs. Russo did not have any state administrative remedies to exhaust before filing this action under 42 U.S.C. sec. 1983, *see Eisen* v. *Eastman*, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970). Mrs. Russo did file a grievance notice pursuant to the contractual grievance procedure in the district. The Superintendent of Schools informed Mrs. Russo that non-renewal determinations of probationary teachers were not subject to grievance procedures. Of course, exhaustion of state judicial remedies is not a predicate to a federal court's jurisdiction in a sec. 1983 claim, *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 1049 (1972).

6 Because we hold that Mrs. Russo was dismissed solely because of the exercise of her first Amendment rights we need not decide what effect the Supreme Court's recent decisions in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), might have on future dismissals of probationary teachers in New York. We note only that by statute, probationary teachers in New York are hired for a period of three years. Whether this is a sufficient period to establish the kind of "claim of entitlement" which the Court spoke of in *Sindermann* as being in the nature of a property right in employment that triggers the application of procedural safeguards before such a claim may be taken away is a question we leave for another day. In this context, however, we note the admirable efforts of the New York legislature to afford protection to probationers. A recent 1972 amendment to New York's Education Law specifically requires that teachers who are not recommended for tenure or who are recommended for dismissal henceforth will be entitled to a written statement giving the reasons for such recommendation. New York Education Law § 3031, McKinney's Sessions Laws, c. 866, 1972.

the art department," (3) "her lack of cooperation," (4) "her refusal to participate in the pledge of allegiance," (5) "her failure to perform all her duties," and (6) "her involvement of the student body in her conflict with the school."

Ordinarily, of course, Rule 52, F.R.Civ.P., binds us to accept findings of fact made by the district court unless they are "clearly erroneous." But equally compelling is the demand in Rule 52(a) that "in all actions tried upon the facts without a jury the court shall find the facts specially ...." The degree of specificity and particularity with which the facts must be found may vary, depending upon the circumstances of each case, *see Kelley* v. *Everglades Drainage District*, 319 U.S. 415 (1943). But we must remember that an important function of findings of fact is to aid an appellate court on review, *see* Advisory Committee Note to Rule 52 (a) (1946); 5A Moore, Federal Practice ¶52.01 [5]. Findings that are nothing but cold rhetoric, couched in extraordinarily broad and general terms, and stripped of underlying analysis or justification or an accompanying memorandum or opinion shedding some light on the reasoning employed, invite closer scrutiny, especially when the case concerns fundamental constitutional freedoms. *See, Schneiderman* v. *United States*, 320 U.S. 118, 129-131 (1943). The need for precision and clarity in fact-finding and the use of cold conclusory statements as a shield to prevent penetrating the absence of facts is made more significant because of the "clearly erroneous" standard, for while errors of law are always correctable by an appellate court, errors of fact rarely are, unless an appellant can scale the high wall which that standard places before him.[7]

[7] *See, United States* v. *Forness*, 125 F.2d 928 (2d Cir.) *cert. denied*, 316 U.S. 694 (1942). Judge Frank, for the court wrote:

> Chief Justice Hughes once remarked, "An unscrupulous administrator might be tempted to say 'Let me find the facts for the

It stands to reason that unless due care is given to the process of fact finding, the reliability of the district court's conclusions will be subject to question, thus compelling a reviewing court to scrutinize the findings with a sharper eye than is ordinarily appropriate.

"A finding is clearly erroneous when although there is evidence to support it, the reviewing court, on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). We are of the view that except with regard to the finding concerning Mrs. Russo's refusal to recite the pledge, the "findings of facts" by the district court with respect to her dismissal are clearly erroneous.

Although Judge Burke lists six grounds for Mrs. Russo's dismissal, his findings discuss only the refusal to salute the flag and the "ceramics incident," a matter about which we shall have more to say in a moment. We are at a loss to understand what Judge Burke meant by his comments upon Mrs. Russo's "failure to follow school regulations," "her lack of cooperation," and her "failure to perform all her duties," unless these "findings" in some way refer to her failure to recite the pledge.[8] Although there was men-

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people of my country, and I care little who lays down the general principles.'" That comment should be extended to include facts without due care as well as unscrupulous fact-finding: for such lack of due care is less likely to reveal itself than lack of scruples, which we trust, seldom exists. And Chief Justice Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards.

125 F.2d at 942.

8 Loughlin's testimony at trial would appear to indicate that this is indeed the case. He said: "I also told the school board that she [Russo] had failed to comply with school regulations. It happened to be saluting

tion in the record of one occasion on which Mrs. Russo, because of some confusion, did not report for hall duty as assigned, we hardly imagine that Judge Burke gave such weight to this trivial occurrence as to attach to it three separate violations. Finally, the court found that Mrs. Russo had involved the student body in her dispute with the principal. We find no evidence in the record to support such a finding.[9]

The ceramics incident remains an obscure contretemps characterizing the personal relationships at Sperry High School. It is obscure inasmuch as principal Loughlin's ne-

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the flag, but it was a school regulation . . . ." Loughlin also offered testimony that indicated that the failure to salute and the ceramics incident were the only significant factors involved in the decision to dismiss Mrs. Russo. He said: "I stated to the Board, as I had to the Superintendent, that I would not recommend Mrs. Russo because she had been insubordinate in refusing to follow a school regulation. And this coupled with her attitude on the statement she made concerning not teaching ceramics generally was the basis (for non-renewal)."

The extent to which Loughlin was influenced by Mrs. Russo's silent refusal to salute the flag is well-illustrated by a teacher "observation" report he filed concerning Mrs. Russo's classroom performance. The report rates Mrs. Russo's "professional characteristics" as "below average" or "poor" in five of six categories, and concludes with the comment: "Mrs. Russo, a first year teacher, has not met her responsibilities to my satisfaction." The report is dated June, 1970, and appears to refer to the entire 1969-1970 school year. Curiously, Loughlin did not see fit to submit a report about Mrs. Russo's classroom performance until he decided to dismiss her, and he did not decide to dismiss her until he learned of her refusal to participate in the pledge exercise. When Loughlin's report is contrasted with Bennett's glowing evaluation, submitted two months earlier, Loughlin's "observation" clearly appears to have been an after-thought and a mere contrivance to establish non-first amendment grounds to justify Mrs. Russo's dismissal.

9 There is some evidence in the record that the school's student body president discussed Mrs. Russo's situation in the school lunchroom, but there is not the slightest hint that Mrs. Russo encouraged him to do so. Indeed, there is evidence indicating that when Mrs. Russo learned of the situation she asked the boy to stop speaking. A petition was circulated by certain students in Mrs. Russo's behalf. Again there is no evidence even tending to show that she encouraged that activity.

count of the occurrence was constantly interrupted by the court, making cogent narration of the event a virtual impossibility. It appears that Loughlin and three members of the school's art department, including Mrs. Russo, met on April 15, 1970 to discuss the qualifications of a teacher who had already been hired to teach ceramics the following year. At that time, Mrs. Russo made the statement that she would not teach ceramics. Loughlin testified quite clearly, however, that he had never asked Mrs. Russo to teach ceramics. Mrs. Russo's version, as she explained to the court, was that she intended her statement as advice to Mr. Loughlin, which she offered in her capacity as one of the three art department teachers present at the meeting. She did not intend to indicate a refusal to teach ceramics, for that issue was not in question. She meant only to say that if she were possessed of the minimal qualifications and training of the replacement ceramics teacher she would not undertake to teach that course. In view of Loughlin's testimony that Mrs. Russo was never asked to teach ceramics, and the fact that a new teacher had already been hired to serve that function, it simply is not believable that Mrs. Russo's statement was meant in any way as a challenge to Loughlin's authority, or that it could have been construed as such.

We are left, then, with the ultimate conclusion that Mrs. Russo's dismissal resulted directly from her refusal to engage in the school's daily flag ceremonies and that all the remaining findings were trimmings to cloak the conduct of the Board and to justify the court's conclusions. We do, however, accept the lower court's findings that school policy required teachers to lead their classes in the pledge exercise and that Mrs. Russo was aware of her responsibility in this respect.

The question, then, is whether dismissal of a high school teacher may be sustained when the sole ground for that

dismissal is the teacher's refusal to comply with a school regulation which required her to participate with her class in the pledge of allegiance. To this question we now turn.

III.

If the central character in this drama were one of Mrs. Russo's students, rather than the teacher herself, we might dispose of this case with a simple reference to the Supreme Court's decision in *Board of Education* v. *Barnette*, *supra*. There the Court was of the view that "in connection with the pledges, the flag salute is a form of utterance." 319 U.S. at 632. "To sustain the compulsory flag salute," the Court said, "we are required to say that a Bill of Rights which guards the individual's right to speak his own mind left it open to public authorities to compel him to utter what is not in his mind." 319 U.S. at 624. The Court declined to do so, and invalidated a West Virginia statute and a Board of Education resolution promulgated under its authority, that required all students to recite the pledge, or suffer expulsion from school.

Thus, there is no question but that the refusal to recite the pledge and salute the flag is a form of expression, and it matters not that the expression takes the form of silence, *see Brown* v. *Louisiana*, 383 U.S. 131 (1966). But here we are concerned with a teacher, and we are asked to determine whether the responsibilities which that teacher has voluntarily assumed, to shape and to direct the supple and still impressionable minds of her students in accordance with policies of the school board, somehow lessen the constitutional rights she would otherwise enjoy. In a related context the Supreme Court has said: "To the extent that the [lower] court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish

First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court [citations omitted]. 'The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' Keyishian v. Board of Regents [385 U.S. 589 (1970)] at 605-606." *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *see also* Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968). Nevertheless, it is also true that society will not "tolerate undisciplined, coercive, intimidating or disruptive activities on the part of teachers or students which threaten the essential function of our schools . . . ." *James* v. *Board of Education, supra*, at 568, and that Boards of Education retain substantial discretion in controlling the educational process in their schools, *see generally*, Note, Developments in the Law—Academic Freedom, 81 Harv. L. Rev. 1045, 1098 (1968). Reasonable regulations designed to effect legitimate purposes, are well within the Board's power, and will be upheld against challenge, by the courts. *See, e.g., Presidents Council, Dist. 25* v. *Community School Board*, 457 F.2d 289 (2d Cir.) *cert. denied*, 41 U.S.L.W. 3251, —— U.S. —— (1972).

It has been stated that children, in many instances, have more limited First Amendment rights than do adults. *See, e.g., Ginsberg* v. *New York*, 390 U.S. 629 (1968) (obscenity); Emerson, Toward A General Theory of the First Amendment, 72 Yale L.J. 877, 938, 939 (1963); *see also, Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 512 (1969), (Stewart concurrence). But here, the school board, as it

did in *James* v. *Board of Education, supra,* would have us decide that the rights enjoyed by schoolchildren are broader than the First Amendment rights of their teachers. In *James* we declined that invitation. The *James* case, which called into question the right of a teacher to silently protest America's involvement in the Vietnam war by wearing a black armband in school, was decided after the Supreme Court's decision in *Tinker* which expressly granted that right to children, where no substantial disruption resulted from the protest. We held that Mr. James could not be dismissed from his employment as a teacher for engaging in protected expression. Similarly, in this instance, the Supreme Court's *Barnette* decision teaches that school children may not be compelled to utter the pledge of allegiance when it offends their conscientiously held beliefs to do so. There is little room in what Mr. Justice Jackson once called the "majestic generalities of the Bill of Rights," *Board of Education* v. *Barnette, supra,* at 639, for an interpretation of the First Amendment that would be more restrictive with respect to teachers than it is with respect to their students, where there has been no interference with the requirements of appropriate discipline in the operation of the school, *Tinker* v. *Des Moines School Dist., supra,* at 509. We add, however, as we did in *James,* that nothing in the First Amendment requires a school administration to wait until disruption has actually occurred before it may take protective action. Conduct which leads, or is likely to lead, to violence in the schools is not to be tolerated. *James* v. *Board of Education, supra,* at 572. But such conduct is not involved in this case. We take guidance, instead, from the Supreme Court's instruction in *Tinker,* whose lesson is that neither students nor teachers "shed their constitutional right to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506; *see*

also Hanover v. *Northrup,* 325 F.Supp. 170 (D. Conn. 1971).[10]

Schools, of course, have a substantial interest in maintaining flag salute programs. New York's Education Law, § 802, imposes a duty upon the Commissioner of Education to prepare a program of flag salute for the public schools, and this duty has been given effect in Regulations of the New York Commissioner of Education, 8 CRRNY §§108.5, 108.7.[11] It is a proper, and appropriate function of our educational system to instill in young minds a healthy respect for the symbols of our national government. School officials, therefore, may enforce regulations whose purpose

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10 In *Hanover* v. *Northrup, supra,* a district court, per Blumenfeld, J., applied the test of *Tinker* and held that the refusal of a teacher to lead or recite the pledge was expression which could not be forbidden at the risk of loss of employment.

11 NEW YORK EDUCATION LAW §802. INSTRUCTION RELATING TO FLAG: HOLIDAYS

1. It shall be the duty of the commissioner of education to prepare, for the use of the public schools of the state, a program providing for a salute to the flag and a daily pledge of allegiance to the flag, for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools.

REGULATIONS OF THE COMMISSIONER OF EDUCATION.

108.5 PLEDGE TO THE FLAG. (a) It is recommended that schools use the following pledge to the flag:

"I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, under God, indivisible, with liberty and justice for all."

(b) In giving the pledge to the flag, the procedure is to render the pledge by standing with the right hand over the heart.

108.7 OTHER INSTRUCTIONS. Instruction concerning the flag as a symbol of American life should not be limited to the observance of Flag Day. Before leaving the elementary school each child should come to think of himself as a "maker of the flag" and each pupil who passes through the secondary school should be guided in sober thought as to the meaning of "liberty and justice for all."

is to give effect to this legitimate state aim. But such regulations must be narrowly drawn for "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963), quoted in *United States* v. *Robel*, 389 U.S. 258, 265 (1967). Traditional First Amendment teaching requires that when "legitimate [state] concerns are expressed in a [provision] which imposes a substantial burden on protected First Amendment activities, [the state] must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms." (citations omitted). *United States* v. *Robel, supra*, at 268; *see* Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969). This kind of precision and less restrictive effect are noticeably lacking in the Board of Education regulations involved in this case and therefore do not meet the test of constitutional exactness required by the First Amendment.

Mrs. Russo neither disrupted her classes nor attempted to prevent her students from reciting the pledge. The record indicates that the class participated in the flag salute program each day under the capable supervision of the senior instructor, Mrs. Catherine Adams. During the pledge, Mrs. Russo acted in a way that can only be described as respectful: she stood in silence with her hands at her sides. We recall, at this point, that the April 14 action of the Board permitted protesting students to remain seated. We note, moreover, that although the federal statute which treats the pledge of allegiance, 36 U.S.C. § 172, suggests that the pledge be rendered by placing the hand over the heart, it also provides that "civilians will always show full respect to the flag when the pledge is given merely by standing at attention. . . ."

In view of all the circumstances in this case, it is clear that the state's interest in maintaining a flag salute pro-

gram was well-served in Mrs. Russo's classroom, even without her participation in the pledge ceremonies. We do well to note that her pupils were not fresh out of their cradles: she had charge of a tenth grade homeroom class consisting of students ranging in ages between fourteen and sixteen years. Young men and women at this stage of development are approaching an age when they form their own judgments. They readily perceive the existence of conflicts in the world around them; indeed, unless we are to screen them from all newspapers and television, it will be only a rather isolated teenager who does not have some understanding of the political divisions that exist and have existed in this country. Nor is this knowledge something to be dreaded. As we said in *James*, "schools must play a central role in preparing their students to think and analyze and to recognize the demagogue." Mrs. Russo made no attempt to proselytize her students. Instead, she provided her high school students with a second, but quiet, side of the not altogether new flag-salute debate: one teacher led the class in recitation of the pledge, the other remained standing in respectful silence. There is nothing to indicate that this demonstration had any effect—certainly no evidence of a destructive effect—on Mrs. Russo's students. Indeed, had it not been for the Board's precipitous action in dismissing her, the very fact that Mrs. Russo was permitted to refrain from saluting the flag would clearly have been evidence to her students that the injustice and intolerance against which she was quietly protesting was not merely not well-founded but a demonstrable falsehood at least within the confines of one school's homeroom class.

VI.

By our holding today we do not mean to limit the traditionally broad discretion that has always rested with local

school authorities to prescribe curriculum, set classroom standards, and evaluate conduct of teachers and students "in light of the special characteristics of the school environment." *James* v. *Board of Education, supra.* Nor do we imply that school officials are limited in their power to dismiss inept or obstreperous instructors, except, of course, to the extent they choose to so limit themselves. Public employment is not a sinecure to be retained regardless of merit simply by shouting loudly that any threat of dismissal is motivated by an anti-First Amendment animus. But where in fact, as in this case, a dismissal is directed because a teacher has engaged in constitutionally protected activity, that dismissal may not stand.

We emphasize, too, that despite our holding that Mrs. Russo may not be dismissed for refusing to pledge allegiance to the flag, we do not share her views. But because the First Amendment ranks among the most important of our constitutional rights we must recognize that the precious right of free speech requires protection even when the speech is personally obnoxious. Freedom of expression, as we said in *James,* requires "breathing room." Patriotism, particularly at a time when that virtuous quality appears much maligned, should not be the object of derision. But patriotism that is forced is a false patriotism just as loyalty that is coerced is the very antithesis of loyalty. We ought not impugn the loyalty of a citizen—especially one whose convictions appear to be as genuine and conscientious as Mrs. Russo's—merely for refusing to pledge allegiance, any more than we ought necessarily to praise the loyalty of a citizen who without conviction or meaning, and with mental reservation, recites the pledge by rote each morning. Surely patriotism and loyalty go deeper than that.

It is our conclusion that the right to remain silent in the face of an illegitimate demand for speech is as much a part

of First Amendment protections as the right to speak out in the face of an illegitimate demand for silence, *see Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957); *Board of Education* v. *Barnette, supra*. Beliefs, particularly when they touch on sensitive questions of fact, when they involve not easily articulated intuitions concerning religion, nation, flag, liberty and justice, are most at home in a realm of privacy, and are happiest in that safe and secluded harbour of the mind that protects our innermost thoughts. To compel a person to speak what is not in his mind offends the very principles of tolerance and understanding which for so long have been the foundation of our great land. "If there is any fixed start in our constitutional constellation," Mr. Justice Jackson said in *Barnette*, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *Board of Education* v. *Barnette, supra*, at 642. We believe that to be an accurate and thoughtful statement of the underlying spirit of the First Amendment and we abide by it here.

Accordingly, the judgment is reversed, and the case is remanded to the district court for proceedings not inconsistent with this opinion.

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KODAK,

Supreme Court of the United States

October Term, 1972.

No. 72-1109

CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF RUSH, HENRIETTA, PITTSFORD and BRIGHTON, COUNTY OF MONROE, STATE OF NEW YORK; RICHARD E. TEN HAKEN, individually and as Superintendent of Schools; CARL ZIEGLER, RICHARD BOBBE, JAMES BREESE, CAROLYN McWILLIAMS, JOHN YOUNG and RANDALL CARTWRIGHT, all individually and as The Board of Education of Central School District No. 1, Towns of Rush, Henrietta, Pittsford and Brighton, County of Monroe, State of New York,

Petitioners,

v.

MRS. SUSAN RUSSO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Table of Contents.

	Page
pinions Below	1
risdiction	1
estions Presented	2
atutes and Regulations Involved	2
atement	2
gument	6
INT I. The decision of the Court of Appeals is clearly correct and in accord with applicable precedent	7
INT II. The Court of Appeals correctly made new findings of fact	15
NCLUSION. Respondent respectfully requests that the petition for certiorari be in all respects dismissed	22

CASES CITED.

renblatt v. United States, 360 U. S. 109 (1958)	9
rd of Education of Union Free School District No. 3, Town of Brookhaven, *et al.*, v. National Education Association of the United States, *et al.*, 30 N. Y. 2d 938 (1972)	14
wn v. State of Louisiana, 383 U. S. 131 (1966)	9
tin v. Board of Education, 10 Ed. Dept. Reps. 168 (1971)	13

Page

C.I.R. v. Duberstein, 363 U. S. 278 (1960) 19

Collins, Matter of, 9 Ed. Dept. Reps. 52 (1969) 11

Epperson v. Arkansas, 393 U. S. 97 (1968) 13

Federal Trade Comm'n v. American Tobacco Co., 274 U. S. 543, 544, 47 S. Ct. 663, 71 L. Ed. 1193 21

Garrity v. State of New Jersey, 385 U. S. 493 (1967) 9

Hanover v. Northrup, 325 F. Supp. 170 (D. Connecticut, 1970) 11

James v. Board of Education, 461 F. 2d 566 (2nd Circ. 1972), cert. den. U. S. (Dec. 6, 1972) 11, 12, 18

Keefe v. Geanakos, 418 F. 2d 359 (1st Circ. 1969) 11

Kelley v. Everglades Drainage Dist., 319 U. S. 415 (1943) 19

Keyishian v. Board of Regents, 385 U. S. 589 (1967) 13

Meyer v. Nebraska, 262 U. S. 390 (1923) 13

New York Times v. United States, 403 U. S. 713 (1972) 15

NLRB v. Pittsburgh S.S. Co., 340 U. S. 498 (1951) 20

Page

Perry v. Sindermann, 408 U. S. 598 (1972) 18

Pickering v. Board of Education, 391 U. S. 563 (1968) 9, 18

Puentes v. Board of Education, 24 N. Y. 2d 996 (1969) 10

Rockwell, Matter of, v. Morris, 12 A. D. 2d 272, affd. 10 N. Y. 2d 721, cert. den. 368 U. S. 913 14

Sherbert v. Verner, 374 U. S. 398 (1963) 10

State v. Lundquist, 262 Md. 534, 278 A. 2d 263 (1971) 11

Sweezy v. State of New Hampshire, 354 U. S. 234 (1957) 8

Terminiello v. Chicago, 337 U. S. 1 (1949) 12

Tinker v. Des Moines Independent School District, 393 U. S. 503 (1969) 11, 12, 13, 15, 18

Tischler, Matter of, v. Board of Education, 37 A. D. 2d 261 (2nd Dept. 1971) 10

United States v. Singer Manufacturing Co., 374 U. S. 174 19

United States v. United States Gypsum Co., 333 U. S. 364 (1948) 16, 19, 21

West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943) 7, 8, 12

Wieman v. Updegraff, 344 U. S. 183 (1952) 8

Zenith Radio Corp. v. Hazeltine Research, 395 U. S. 100 (1969) 21

STATUTES CITED.

	Page
F. R. Civ. P., Rule 52	16, 19
N. Y. Education Law, §310	10
N. Y. Education Law, §3012	2
Regulations of the N. Y. Commissioner of Education, §108.5 (8 NYCRR §108.5)	6, 13
36 U.S.C. §172	6

IN THE

Supreme Court of the United States

OCTOBER TERM 1972.

No. .

CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF RUSH, HENRIETTA, PITTSFORD AND BRIGHTON, COUNTY OF MONROE, STATE OF NEW YORK; RICHARD E. TEN HAKEN, individually and as Superintendent of Schools; CARL ZIEGLER, RICHARD BOBBE, JAMES BREESE, CAROLYN MCWILLIAMS, JOHN YOUNG and RANDALL CARTWRIGHT, all individually and as The Board of Education of Central School District No. 1, Towns of Rush, Henrietta, Pittsford and Brighton, County of Monroe, State of New York,

Petitioners,

v.

MRS. SUSAN RUSSO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the District Court is set forth as an Appendix to the Petition at pages 16-21. The opinion of the Court of Appeals for the Second Circuit is reported at 469 F. 2d 623, and is reproduced as an Appendix to the Petition at pages 23-42.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented.

1. Is the non-disruptive, conscience-motivated action of a New York State public high school teacher who stands in respectful silence while the Pledge of Allegiance to the Flag is being broadcast over a public address system into her school homeroom, and being simultaneously repeated by a fellow teacher and the students, protected by the First Amendment?

2. Does the dismissal of that teacher under the aforesaid circumstances constitute a violation of the teacher's First Amendment-protected rights of free speech?

Statutes and Regulations Involved.

The relevant statutes and regulations are set forth at pages 3 through 5 of the Petition.

Statement.

Respondent Russo was appointed by petitioner school district to a three-year probationary term of employment as a public high school art teacher pursuant to *N. Y. Education Law*, §3012 (App. 29-30a). The employment relationship continued for the full probationary term and no annual renewal is required. Russo signed a loyalty oath when appointed. Teachers' duties relative to the Pledge of Allegiance (hereinafter "the Pledge") were not discussed before or at the time of Russo's hiring, at the orientation sessions for new teachers, or in the written teacher's manual (App. 29-30a, 36a; Pl. Ex. 5; 32-34a; Pl. Ex. 4; 34-35a).

The school day included a homeroom period where students reported each day for the taking of attendance

and other administrative functions. No instruction was scheduled for the homeroom period.

Russo was assigned to a senior high school homeroom, jointly with a teacher with seven years of experience in the district (App. 35a, 102a). The room contained a flag in a corner behind the teachers' desks. Each day the Pledge was broadcast into the homeroom (App. 37a, 124-125a) and Russo stood, turned to face the flag, and remained silent with her arms at her side in a respectful manner during the Pledge (App. 37-38a, 81a, 103a). The other homeroom teacher recited the pledge, together with most of the students, and all students knew the words of the Pledge (App. 37-38a, 81a, 103a).

Russo's silence during the Pledge was motivated by her belief that one's patriotism is best manifested by one's behavior, not by rote recitation. She further believed that the words "liberty and justice for all" were not accurate in the context of American life at this time, and that it would be hypocritical to recite those words. Russo never attempted to indoctrinate her pupils with her views (App. 39-40a).

A terse directive regarding teachers' duties during the Pledge was posted on the faculty bulletin board, and, although there is a question of fact as to whether Russo was aware of the directive, for the purpose of this memorandum it will be presumed that she knew, or should have known, of its contents. Although Russo never recited the Pledge from her first homeroom in September of 1969 onward, the school administration did not raise the issue for some eight months (App. 40a, 153-155a). Before her non-recitation of the Pledge was noticed by the administration, Russo received a favorable written evaluation from an assistant principal (App. 45-46a, 222a, 339a; Pl. Ex. 7).

On April 14, 1970, the Board of Education adopted a Pledge policy applicable to students allowing those who did not wish to recite the Pledge to remain respectfully seated. Shortly thereafter, Russo's principal observed her respectful silence during the Pledge (App. 18a). The following day the principal met with Russo and ascertained the reasons for her non-recitation. He advised Russo to reconsider her actions, but did not order her to recite or teach the Pledge (App. 41a, 152-153a). During April-June, 1970, the Board of Education received communications from parents concerning Russo's non-recitation of the Pledge, but did not direct the school administration to order Russo to take any action vis-a-vis the Pledge (App. 234a-245a, 259-260a) or to inform her that failure to repeat the Pledge would be insubordination or otherwise form the basis for dismissal. The Pledge issue was debated at the April 28, 1970 Board of Education meeting (App. 2, 27a, 368a).

The principal again observed Russo not saying the Pledge about May 1, 1970, and met with her again. He informed Russo that he was recommending that her probationary employment not be renewed. Russo asked if the non-recitation of the Pledge was the reason, but the principal refused to give a reason for his decision (App. 153-154a). The principal wrote to the Superintendent of Schools recommending Russo's dismissal (App. 350a; Pl. Ex. 17).

On May 12, 1970, the Board adopted more punative and restrictive regulations regarding students who did not recite the Pledge; yet the Board adopted no Pledge regulations applicable to teachers (App. 334-340a; Pl. Exs. 10-12). Russo commenced a grievance pursuant to the contract covering the school district's teachers, but received no reasons for her dismissal when the chief

school administrator refused jurisdiction of the grievance (App. 359a; Pl. Ex. 20). A second and less favorable evaluation of Russo's performance was written in June, 1970; however, she was not informed of its existence and it was not discussed with her, in violation of the Board of Education's contract (App. 47-50a, 347a; Pl. Ex. 16).

By the end of the school year, the Board of Education had taken no action with regard to Russo and the agenda for its June 23 meeting contained no mention of Russo. The Board ran entirely through the agenda on that night and then went into executive (secret) session where it remained closeted for several hours until after 1 a.m. When the Board emerged from its executive session, the members of the public in attendance, including Russo, had all left and the Board adopted its resolution to fire her. The Board did not afford Russo a chance to speak in her own defense, and neither the Superintendent's recommendation for dismissal, the Board's dismissal resolution, nor the notice to Russo give any reasons for the dismissal (App. 344-346a; Pl. Exs. 14-15). On the trial in District Court, petitioners attempted to raise as justification for its action the "ceramics teaching" incident, which involved a hypothetical statement by Russo made in the course of an Art Department meeting that she would not take a position for which she was not qualified (App. 96-97a, 167a, 213-214a). Russo never received nor refused an actual order to teach ceramics (App. 96-97a, 213-214a). The Board also raised Russo's failure to arrive at a hall monitoring position on one or two occasions owing to a scheduling mixup (App. 94-96a). However, board member Breese testified that Russo's non-recitation of the Pledge was a reason for her dismissal (App. 253a). Board member Cartwright testified that Russo's acts in standing silently during the Pledge were factors in her dismissal (App. 301a, 304a).

The Superintendent of Schools testified that Russo's non-recitation of the Pledge was a motivation in his recommendation for dismissal, and the Board gave great weight to that recommendation (App. 288a, 304a).

ARGUMENT.

This Court has consistently upheld the rights of public employees to freely exercise their First Amendment rights absent some urgent overriding public necessity for the limiting of those rights. The record demonstrates no such necessity. Russo's high school pupils knew the Pledge, and the co-homeroom teacher always recited the Pledge, which was broadcast into the homeroom as well. 36 *U. S. C.* §172 provides that standing silently at attention during the pledge shows full respect for the flag and no Federal laws mandate recitation of the Pledge. *The Regulations of the New York Commissioner of Education* §108.5 do not mandate teaching or recitation of the Pledge, but advise that secondary school pupils "* * * be guided in sober thought as to the meaning of 'liberty and justice for all.'" Russo met those duties. The Record does not manifest any attempts by Russo to indoctrinate her pupils, nor any disorder resulting from her non-recitation. Such rote teaching is no longer considered by most educators to be educationally sound and rote recitation of the 31 words of the Pledge seems to be a poor method of instructing high school students concerning the citizen's complex relationship with his country.

The Court of Appeals was correct in rejecting the Finding of Fact by the District Court that Russo's dismissal was motivated in part by her refusal to teach a course (the ceramics teaching incident), her failure to perform all duties and her involvement of her students in her controversy. The Record reveals that the ce-

ramics incident involved a discussion among teachers, including Russo, concerning the hiring of a ceramics teacher. Russo made the hypothetical remark in the course of her duties as a representative of the art department that she would not teach ceramics if she had no training in that field. She was never ordered to teach, and she never refused to teach, a ceramics course. The Record further reveals that Russo actually discouraged students from involving themselves in her dismissal. The only other alleged failure of Russo to perform duties developed in the Record concerned a trivial failure, owing to a misunderstanding, to perform hall monitoring duties on one or two occasions. There can be no doubt that the non-recitation of the pledge was the motivating reason for her dismissal and that, in taking its action, the Board of Education relied on no federal or state law requiring teachers to participate in the pledge, but stood upon its own claim of absolute power.

POINT I.

The decision of the Court of Appeals is clearly correct and in accord with applicable precedent.

The decision below wisely continues the policy of this Court in assiduously protecting the rights of free speech of public employees, especially teachers. Petitioners failed below to establish a public interest in coercing Russo to recite the Pledge sufficient to override Russo's First Amendment--protected rights to remain respectfully silent.

The right of free speech in the schools in connection with the Pledge was established in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943).

Barnette goes beyond the rights of the students involved, and protects all citizens against state-imposed political dogma:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or for citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
>
> "We think the action of the local authorities in compelling the flag salute and the pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control" (p. 642).

This broad protection is as applicable to teachers as to students, especially in light of later decisions of This Court. The decision below (Petition, p. 23, at p. 42) relied heavily upon the quoted language from *Barnette*.

In *Wieman v. Updegraff*, 344 U. S. 183 (1952), This Court protected the right of a public college teacher to refrain from signing a loyalty oath, after balancing the state interest in protecting itself from subversion against the individual's right not to be excluded from public employment on arbitrary grounds (p. 188). *Wieman* held that "• • • the flow of democratic expression and controversy • • •" was more important than the state's alleged interest. Similarly, in *Sweezy v. State of New Hampshire*, 354 U. S. 234 (1957), This Court protected the right of a state-employed professor to refrain from answering questions which might "• • • impinge upon such highly sensitive areas as freedom of speech

• • • [and] freedom of communication of ideas" (p. 245). See also *Barenblatt v. United States*, 360 U. S. 109 (1958). A silent, peaceful protest was also given First and Fourteenth Amendment protection in *Brown v. State of Louisiana*, 383 U. S. 131 (1966).

In *Garrity v. State of New Jersey*, 385 U. S. 493 (1967), This Court stated at page 497 that speech coerced by threatened loss of public employment was "• • • the antithesis of free choice to speak out or remain silent," and held that public benefits may not be conditioned on the relinquishing of First Amendment rights (p. 500). Russo did not withhold information or refuse to provide information relative to her political loyalty. In fact, she freely signed a loyalty oath (App. 36a; Pl. Ex. 5). Russo's act of non-speech was an innocent abstention from the rote and unthinking recitation of a Pledge, the value of which as an expression of loyalty or as a teaching tool is debatable. Russo's non-conforming but dignified behavior demonstrated more respect for flag, country and the fundamental rights of others than does the mumbled recitation of a catechism rendered meaningless through innumerable unthinking repetitions.

This Court has also protected the right of teachers to speak out, even in a manner embarrassing to their employers. In *Pickering v. Board of Education*, 391 U. S. 563 (1968), a public school teacher wrote a letter to a newspaper inaccurately criticising his school administration. This Court, at page 568, rejected the concept that school teachers may be compelled to relinquish First Amendment rights that they would otherwise enjoy as citizens to comment on matters of public interest. Similarly, Russo's refusal to recite a Pledge that she did not view as accurately reflecting current American life can be viewed as a protected right to comment on public

affairs. Her refusal to recite was not a refusal to teach; she was never ordered by petitioners to teach the Pledge which all of her students already knew (App. 38a). Russo's actions were further protected under *Pickering*, which held that a lack of proof that Pickering's actions caused friction with other teachers supported his rights to speak out. The record does not reveal any friction with other staff members or students caused by her actions and the record is totally lacking in any proof of interference with the functioning of the schools.

Similarly, in *Sherbert v. Verner*, 374 U. S. 398 (1963), a public employee's First Amendment rights were protected unless the state could show more than "a colorable state interest" in limiting those rights; instead, the state had to demonstrate "* * * only the gravest abuses, endangering paramount interests * * *" (p. 406). It is hard to imagine a paramount interest by Petitioners herein in having a teacher of high school students join with the students in the rote recitation of a familiar 31-word Pledge, especially in the absence of any proof in the Record of resulting damage to her pupils.

New York courts have protected free speech rights of public school teachers. In *Matter of Tischler v. Board of Education*, 37 A. D. 2d 261 (2nd Dept. 1971), the Appellate Division held that statutory tenure may not be denied "* * * for the purpose of retaliating against a teacher from exercise of constitutional rights * * *" unless an "overriding" governmental interest could be shown (at p. 264). In *Puentes v. Board of Education*, 24 N. Y. 2d 996 (1969), New York's highest court, relying in part on *Pickering*, annulled the disciplining of a teacher who promulgated a caustic letter criticising the school administration. The New York Commissioner of Education, given quasi-judicial powers in educational matters by N. Y. *Education Law*, §310, recognized con-

stitutionally protected rights of teachers to individual freedom absent overriding public interests in *Matter of Collins*, 9 Ed. Dept. Reps. 52 (1969) (protecting the rights of a teacher to wear his hair in a certain fashion). Similarly, Maryland's highest state court annulled the dismissal of a teacher who refused to recite the Pledge in *State v. Lundquist*, 262 Md. 534, 278 A. 2d 263 (1971). A case almost identical to this case was decided in favor of the teacher in *Hanover v. Northrup*, 325 F. Supp. 170 (D. Connecticut 1970). In cases such as *Keefe v. Geanakos*, 418 F. 2d 359 (1st Circ. 1969), the First Amendment right of a teacher to present controversial material to a high school class has been upheld.

Tinker v. DesMoines Independent School District, 393 U. S. 503 (1969), afforded First Amendment protection to the right of public school students, slightly younger than the students in Russo's homeroom, to wear black armbands to school in protest against the Vietnam war. *Tinker's* general guidelines for the exercising of school authority limiting First Amendment rights are based on evaluations of the state's interest in maintaining order in the schools. *Tinker* limited such authority at pages 507-508 to "* * * reasonable regulation of speech-connected activities in carefully restricted circumstances."

The protection afforded to students in *Tinker* was extended to teachers in *James v. Board of Education*, 461 F. 2d 566 (2nd Circ. 1972), cert. den. U. S. (Dec. 6, 1972). James was a public school teacher who wore a black armband to class on a Vietnam moritorium day, contrary to specific orders from his superiors. James, while performing his teaching duties, by his appearance expressed his personal view of a political matter, and surely many of his students knew that the armband signified disapproval of the Vietnam war. Yet

the Second Circuit reversed James' dismissal, and this Court did not choose to grant certiorari. Russo's act of remaining silent carried no specific or identifiable message, and there is no evidence that Russo was using her teaching position to influence her pupils. Russo made no attempt to indoctrinate or proselytize her students, and the modest nature of her individual non-conformity is perhaps best illustrated by the fact that it went unnoticed by school authorities from September until April.

The fact that Russo's silence was motivated by conscience and not by any religious belief does not take the case outside of the principles established by *Barnette, Tinker* and *James* since the First Amendment does not limit the guarantee of free speech to speech motivated by religious conviction. Indeed, it does not appear that the students in *Tinker* were acting for religious reasons.

The petition correctly argues at pages 8-9 that a school district may lawfully exercise substantial discretion in controlling school affairs; however, this discretion must be exercised within the framework of the constitutional guarantees which protect the citizen from government. In this regard, the power of a local board of education is certainly not greater than that of other levels or divisions of government. On the trial petitioners were unable to demonstrate any actual or threatened disruption or other adverse impact on school affairs flowing from Russo's respectful silence during the Pledge. Emotional fears of anticipated disorder based on conjecture and speculation and not supported by any factual proof were held insufficient to justify a restriction on First Amendment rights in *Tinker*, citing *Terminiello v. Chicago*, 337 U. S. 1 (1949).

First Amendment rights to make controversial statements or teach controversial subjects in school have also been upheld by this Court. This Court struck down restrictions on teaching Darwinian evolution in *Epperson v. Arkansas*, 393 U. S. 97 (1968), holding that "• • • laws that cast a pall of orthodoxy over the classroom" will not be tolerated, citing *Keyishian v. Board of Regents*, 385 U. S. 589 (1967). *Epperson* also cited *Meyer v. Nebraska*, 262 U. S. 390 (1923), which struck down a statute forbidding the teaching of classes in a foreign language to elementary students. Russo's silence did not present the problems of the magnitude of affirmative controversial speech in the schools. The state's power to control the schools is not limitless, and the decision below was correct in holding that the Board of Education was limited in its power to abridge Russo's First Amendment rights.

The Commissioner of Education of New York State has ruled that high school students may refrain from reciting the Pledge, and may not be required to obtain parental approval for such acts, since such students "• • • are of sufficient age to make their own judgments in matters of conscience" (*Bustin v. Board of Education*, 10 Ed. Dept. Reps. 168 [1971]). *Bustin* accords with *Tinker*, and the Commissioner's *Regulations* §108.5 (8 *N. Y. C. R. R.* §108.5) only requires that high school students be guided in sober thought as to the meaning of liberty and justice for all. There is no compelling state interest sufficient to override Russo's First Amendment rights in forcing Russo to recite a Pledge when her pupils could freely and legally refuse to join in the recitation and when state regulations and Federal law do not mandate such rote recitation. However, *Tinker* holds that pupils have First Amendment rights analagous to the right to remain respectfully silent during the

Pledge. Teachers' rights to free speech should be as broad as those of their students as held in the opinion of the court below. That holding is in accord with logic and precedent. To present students with the spectacle of a teacher having free speech rights more limited than their own would seem to undermine, not forward, the state's interests in school discipline and decorum, and ultimately in a free and informed electorate.

While cases involving prepublication restraint of speech are not identical to the case at bar, they are closely analagous and it would seem that the standards there established are applicable here. In prepublication restraint cases, the courts require a factual showing of a clear and immediate threat of irreparable injury before speech will be enjoined. The New York Court of Appeals and this Court have both recently spoken emphatically to protect private rights against government restraint.

In *Board of Education of Union Free School District No. 3, Town of Brookhaven, et al., v. National Education Association of the United States, et al.,* 30 N. Y. 2d 938, reversing 37 App. Div. 711, the New York Court of Appeals adopted the dissenting opinion of Justice Hopkins in the Appellate Division which said *inter alia* at page 711, *et seq.*:

> "Regulations aside, there is no power in government under our Constitution to exercise prior restraint of the expression of views, unless it is demonstrable on a record that such expression will immediately and irreparably create injury to the public weal—not that such expression, without itself being unlawful, will incite criminal acts in others (*Matter of Rockwell v. Morris,* 12 A. D. 2d 272, 277-278, affd. 10 N. Y. 2d 721, cert. den. 368 U. S. 913). * * *

> "A balance between individual rights of freedom and the public interest in maintaining the efficiency of the school system must be recognized (*Pickering v. Board of Educ.*, 391 U. S. 563). But the burden is always on the State to prove that the action to be restrained would materially interfere with the necessary operations of a public function (cf. *Tinker v. Des Moines School Dist.*, 393 U. S. 503, 506, 512-513)."

This Court, in *New York Times v. United States*, 403 U. S. 713 (1972), denied injunctive relief where the government had failed to demonstrate that disclosure of the contents of classified documents would surely result in direct, immediate and irreparable damage to the nation.

The Board of Education has totally failed to prove that Russo's conduct constituted a clear and immediate threat of irreparable injury which would justify a limitation on her constitutional right to free speech, and its action in dismissing Russo for her silence is an unlawful invasion of her First Amendment rights. The mainstream of constitutional law overwhelmingly flows on the course of protection for the First Amendment rights of teachers and all other citizens. There is no need to grant certiorari in this case, which follows the great majority of modern precedents.

POINT II.

The Court of Appeals correctly made new findings of fact.

The District Court made findings of fact that Russo's employment was terminated owing to "* * * her failure to follow school regulations, her refusal to teach a course

in the art department, her lack of cooperation, her refusal to participate in the Pledge of Allegiance, her failure to perform all duties, and her involvement of the student body in her conflict with the school" (App. 322a). The Court of Appeals properly reviewed and rejected these findings of fact, which were described as "cryptic" (Petition, pp. 30-31).

The Court of Appeals cited the requirement of Rule 52 (a), *F. R. Civ. P.*, for a high degree of specificity in fact finding in First Amendment cases, and for the Court of Appeals' right to correct "clearly erroneous findings of fact" (Petition, pp. 31-32). In *United States v. United States Gypsum Co.*, 333 U. S. 364 (1948), This Court rejected various findings of fact of the District Court sitting without a jury, and stated (p. 395) that a finding is "clearly erroneous" when "* * * although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The Court of Appeals herein reversed the finding of fact below that Russo was dismissed in part owing to her refusal to teach a ceramics class, on the grounds that the finding was clearly erroneous. That conclusion is supported by the Record. The Principal of Russo's school testified that the ceramics incident concerned the qualifications *not* of Russo but of a newly hired art teacher. The matter was discussed by the Principal and three representatives of the teachers, including Russo (App. 151a). During this discussion, Russo stated that she would not teach a course in ceramics (App. 150a). Russo was merely speaking hypothetically to express the more general idea that she would not take a job for which she was not qualified, with the implication that the newly hired teacher was also not qualified

to teach ceramics (App. 97a, 149-151a). The Principal and Russo both testified that Russo was never offered a ceramics teaching assignment, and consequently never refused to accept such an assignment (App. 96a, 150a). The art department was fully staffed for the 1970-71 school year (App. 163a). Thus, the Court of Appeals properly decided that the Finding of Fact that Russo was terminated in part owing to her refusal to teach a course which had never been assigned or even offered to her was clearly erroneous.

The Court of Appeals also properly held that the vague District Court findings of fact that Russo had failed to follow school regulations, had shown a lack of cooperation, and had failed to perform all duties all referred to the one real ground for Russo's dismissal —her actions in not reciting the Pledge (Petition, pp. 32-33). An incident involving Russo's failure to report for hall monitoring duty because of some scheduling confusion was properly dismissed by the Court of Appeals as a "trivial occurrence." Most teachers were confused about their hall monitoring duties after a schedule change (App. 96-97a). Russo only missed hall duty once or twice, never refused to perform the duty, and appeared at all times for hall monitoring duty after the initial confusion was dissipated (App. 208a, 227a). Board members Breese and Cartwright did not even recall at the trial that hall monitoring was one of the bases for Russo's dismissal considered by the board (App. 254-255a, 301-302a).

Clearly, Russo's exercise of her First Amendment rights was the overriding reason for her dismissal; all the rest was mere afterthought and deceptive gloss designed to conceal the real and unlawful reason for the action. Board members Breese and Cartwright both

testified that Russo's non-recitation of the Pledge was a major reason for the Board of Education's actions in dismissing her (App. 254-255a, 301-302a, 304a). Principal Loughlin testified that his reference to Russo's insubordination and refusal to follow school regulations in his recommendation for her dismissal were based upon her act in not reciting the Pledge (App. 188-189a, 197a). The Superintendent stated that Russo's failure to recite the Pledge was a factor in his recommendation for her dismissal (288a). This Court refused to grant certiorari in the analogous case of *James v. Board of Education*, 461 F. 2d 566 (2nd Circ. 1972), even though James had clearly been insubordinate in wearing a black armband.

No student disorders arose in connection with Russo's actions that would permit limitation of her First Amendment rights under *Pickering* or *Tinker*, *supra*. Any student unrest was based upon *students'* duties vis-a-vis the Pledge and the contemporaneous Kent State incident (App. 142-144a, 169a). Russo's dismissal was discussed by students speaking with permission of the principal at lunchtime, but no disorder ensued (App. 184-185a). Russo attempted to stop even this limited discussion of her situation (App. 89-90a).

Thus, the Court of Appeals was correct in making new findings of fact that Russo's activities in not reciting the Pledge were the sole ground for her dismissal (Petition, pp. 34-35). Even if we assume *arguendo* that other grounds for dismissal existed, the limitations on Russo's First Amendment rights were so interwoven in the dismissal procedure that the decision below was fully justified. This Court recently affirmed its prior holding that even non-tenured public school teachers may not be subjected to dismissal predicated on the exercise of First Amendment rights (*Perry v. Sindermann*, 408 U. S. 598 [1972]).

Under the test set forth in *United States v. United States Gypsum Co.*, 333 U. S. 364 (1948), the Court of Appeals was justified by the evidence in making the finding that the Pledge issue was the basis for Russo's dismissal. Sparse and conclusory findings of fact, such as those made by the District Court herein, were also found not to comply with Rule 52, *F. R. Civ. P.* in *C. I. R. v. Duberstein*, 363 U. S. 278 (1960). *Kelley v. Everglades Drainage Dist.*, 319 U. S. 415 (1943), held that the findings of fact had to be sufficient to indicate the factual basis for the ultimate conclusion; otherwise, the appellate court had the right to review the findings of fact. The central issue in this case is the degree that Russo's dismissal was predicated upon her exercise of First Amendment rights. The findings of fact of the District Court were shockingly deficient in precisely that area. The District Court did not adequately distinguish between alleged insubordination and lack of cooperation based upon Russo's Pledge-related activities and insubordination based on other teaching considerations. Consequently, the Court of Appeals made a new finding, amply supported by references to the Record, that Russo's refusal to recite the Pledge was the basis for her dismissal. Such fact-finding was correct and does not provide a basis for granting the Petition for Certiorari herein.

Even if the findings of the District Court that Russo was dismissed for reasons other than non-recitation had some support in the Record, the Court of Appeals could have made new findings of fact under the "clearly erroneous" test of *United States v. United States Gypsum, supra* (see also, *United States v. Singer Manufacturing Co.*, 374 U. S. 174, 195 [fn. 9]). As discussed above, Russo's alleged "insubordination" was related by her principal to her activities relative to the Pledge.

The sequence of events supports the Court of Appeals' finding that non-recitation of the Pledge was the real reason for Russo's dismissal. She did not recite the Pledge for eight consecutive months (App. 37-38a, 81a, 103a), yet the administration first raised the Pledge issue about May 1 (App. 41a, 152-153a). This decision to discuss the Pledge with Russo was contemporaneous with two board of education meetings on April 28 and May 12, 1970. At the first meeting, the liberal board policy regarding Pledge recitation by students was criticized and debated. At the board meeting of May 12, the board adopted much harsher regulations dealing with students not reciting the Pledge (App. 327a, 340a; Pl. Exs. 11, 12). It is clear that the school authorities were satisfied by Russo's performance (Pl. Ex. 7) until it was discovered that she was silent during the Pledge. Then, in the environment of heated public debate regarding student rights and the Pledge, the witch hunt for reasons to justify Russo's dismissal ensued. As the Court of Appeals noted (Petition, p. 32, fn. 8), Russo received a good evaluation immediately prior to the Pledge dispute (App. 45-46a, 222a; Pl. Ex. 7) and a bad (and secret) evaluation after the Pledge issue developed (App. 47-50a). The relationship between the Pledge issue and the dismissal is obvious.

The new finding of fact by the Court of Appeals, being well supported by the Record, does not in itself justify the granting of certiorari.

In *NLRB v. Pittsburgh S. S. Co.*, 340 U. S. 498 (1951), a Court of Appeals reversed an NLRB decision owing to its belief that the record was not supported by substantial evidence. Mr. Justice Frankfurter stated at page 503:

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fairminded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' *Federal Trade Comm'n v. American Tobacco Co.*, 274 U. S. 543, 544, 47 S. Ct. 663, 71 L. Ed. 1193."

We respectfully suggest that this Court should apply the same criteria herein and deny certiorari.

Petitioners rely heavily on *Zenith Radio Corp. v. Hazeltine Research*, 395 U. S. 100 (1969). *Zenith* did reiterate the test of *United States Gypsum*, allowing the appellate court to consider the entire evidence and then determine whether or not a mistake was made (p. 123). The *Zenith* decision was based in part on the peculiar problems of proof inherent in a treble-damages case. This Court said at page 123:

"• • • damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts."

Conversely, the Record in this case is relatively simple. Moreover, the new finding of fact by the Court of Appeals did not hinge on questions of the relative credibility of witnesses, merely upon the conclusion drawn from an analysis of the testimony as a whole.

Furthermore, no damages have been assessed by the Court of Appeals and presumably the remand to the District Court was ordered for the purpose of proof on the question of damages.

The Court of Appeals acted correctly in making new findings of fact as to the reason for Russo's dismissal.

CONCLUSION.

Respondent respectfully requests that the petition for certiorari be in all respects dismissed.

Respectfully submitted,

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